

Additional Exhibit  
EXHIBIT B 11  
DATE 3/27/09  
SB 94



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March 24, 2009

Honorable Mike Milburn  
Chair of House Natural Resources Committee  
Montana Legislature

Re: SB 94

Dear Representative Milburn,

We have been asked to comment on SB 94 on behalf of the Montana Well Drillers Association. Hydrometrics is a Montana based consulting firm that has specialized in water resource issues for 30 years. Doug Parker is a hydrogeologist in the firm's Missoula office and Bill Thompson is a hydrogeologist and manager of the firm's Helena office hydrologic staff. Combined they have over 50 years experience with groundwater, surface water and water rights issues.

Our reading of the proposed changes to SB 94 is that this bill intends to clarify and "clean-up" some of the language to facilitate the Department of Natural Resources and Conservation's (DNRC) administration of the requirements of the current law. The Department should be commended for this attempt and in large part the proposed modifications provide useful clarification.

However, we have several concerns about proposed language and would like to offer the following comments:

- 1) 85-2-360 (6) striking ~~...historical beneficial use of the appropriation right...~~ may cause confusion as final adjudication of water rights in Montana is not completed and "appropriation rights" may change once final adjudication is complete. Further, the concept of historical beneficial use is an important one and removing this language may place undue emphasis on maximum diversion rates claimed by existing appropriators versus the actual amounts put to beneficial use.

- 2) 85-2-362 (2) (b) Specific reference to Montana groundwater discharge permit laws appears to dismiss the possibility of aquifer recharge through an injection well administered under EPA's Underground Injection Control program. This section also seems duplicative of, but more narrow than 85-2-364 (1); perhaps this change is not needed.
- 3) 85-2-363 (2) (d) Striking of the very stringent requirement that ~~"...proves by a preponderance of the evidence that net depletion, if any, will not adversely affect a prior appropriator based on the applicant's mitigation plan or aquifer recharge plan; the department shall issue the permit"~~, eliminates one of the few avenues of recourse for an applicant from relying solely on the DNRC's judgment of what an acceptable mitigation plan is.
- 4) This bill misses an opportunity to address one of the main concerns of water rights holders and potential new users in closed basins which is the definitions of "net depletion" and "adverse effect". It is our understanding that the DNRC essentially views any calculable reduction of water from a surface water due to groundwater use as "net depletion". There is apparently no de minimus amount that does not qualify as depletion. Very small amounts of depletion can be difficult and costly to evaluate and mitigate, particularly when the use of conservative assumptions lead to very small amounts of predicted depletion in multiple water bodies. Further, it is our understanding that DNRC de facto assumes that any depletion is an "adverse effect." While the bill specifically states that the prediction of net depletion does not equate to adverse effect, the absence of any defined lower threshold limit for net-depletion or adverse effect makes them effectively equivalent.
- 5) Existing law [85-2-360 through 364] provides a difficult test for new appropriations in closed basins and we appreciate the DNRC's difficult task of trying to develop efficient and minimally burdensome methods to address the requirements of the law. However, the legislature must recognize that even with the DNRC's efforts to date, the development of hydrologic assessments and mitigation plans meeting the requirements is generally complex and expensive. An applicant may choose to use simplifying assumptions acceptable to the DNRC which generally result in substantially overestimating the impacts of groundwater withdrawal but may reduce the costs associated with a consulting hydrogeologist or engineer to only a few thousand to a few tens of thousands of dollars, but can greatly increase the costs of mitigation. Alternatively, a comprehensive hydrologic assessment evaluating an area with little available information and requiring modeling acceptable to DNRC could easily cost \$50,000 or more. In general, the requirements of this law price the solutions (hydrologic assessment studies and mitigation plans acceptable to DNRC) out of the reach of most small landowners.

Thank you for the opportunity to comment on SB 94. If you have any questions, we would be happy to try to address them.

Sincerely,

Doug Parker (406-721-8243)  
Bill Thompson (406-443-4150)

Cc: Tammy Johnson